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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

In re L.M. et al., Persons Coming Under
the Juvenile Court Law.

DEL NORTE COUNTY DEPARTMENT
OF HEALTH & HUMAN SERVICES,

Plaintiff and Respondent,

v.

B.M.,

Defendant and Appellant.

A154551

(Del Norte County
Super. Ct. Nos. JVSQ146111, JVSQ156145)

B.M. (Father) appeals from the order denying a hearing on his petition for modification under Welfare and Institutions Code section 388,¹ which he filed after his children were placed in a legal guardianship following a section 366.26 permanency hearing. He contends the juvenile court erred in finding that the petition, by which he sought to regain full custody, did not state a prima facie case of changed circumstances or that the proposed change would be in the children's best interests. We affirm the order.

¹ Further unspecified statutory references are to the Welfare and Institutions Code.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY²

I. Background

“Father and H.O. (Mother) are the parents of L.M. (born in August 2014) and B.M. (born in July 2015). Mother is an enrolled member of the Yurok Tribe and Father is an enrolled member of the Choctaw Nation of Oklahoma. [¶] Mother, who has two older children who do not reside with her, has numerous child welfare referrals for drug use, inappropriate supervision, and domestic violence dating from 2006. (Fn. omitted.) Both parents also have a criminal history. Father’s criminal history includes convictions dating from 1992 to 2014, including manufacturing and selling controlled substances, reckless driving, possession of a firearm, assault, and receiving stolen property.

“[¶]

“On August 19, 2014, a section 300 petition was filed as to L.M. L.M. had tested positive for amphetamines at birth, and Mother reportedly admitted that she used methamphetamine the day before her son was born. At the time, Father was incarcerated. Father also admitted he had a substance abuse problem. The [Del Norte County Department of Health & Human Services (Department)] alleged L.M. was at risk of serious physical harm under section 300, subdivisions (b) and (g), due to the parents’ drug abuse, the child’s positive drug test at birth, and the parents’ criminal activity.

“On August 21, 2014, the juvenile court ordered L.M. to be detained and placed in out-of-home care. [¶] . . . [¶] At the October 31, 2014 disposition hearing, the juvenile court ordered L.M. removed from the custody of his parents. The court found that active efforts were made to prevent the breakup of the Indian family. The parents were granted

² Quoted portions from the factual background come from our prior opinion in *In re L.M.* (Jan. 26, 2017, A148062, A148159) [nonpub. opn.], which we judicially notice on our own motion. (Evid. Code, § 452, subd. (d).) Citation of our prior unpublished opinions is permitted by California Rules of Court, rule 8.1115(b)(1) “to explain the factual background of the case and not as legal authority.” (*Pacific Gas & Electric Co. v. City and County of San Francisco* (2012) 206 Cal.App.4th 897, 907, fn. 10; *The Utility Reform Network v. Public Utilities Com.* (2014) 223 Cal.App.4th 945, 951, fn. 3; *Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 443–444, fn. 2 [discussing Cal. Rules of Court, former rule 977].)

reunification services. Father was ordered to participate in domestic violence counseling, parenting education, substance abuse treatment, and to submit to drug testing.” (*In re L.M., supra*, A148062.)

At the six-month status review in April 2015, L.M. was returned to his parents’ care. L.M. and B.M. were detained in September 2015 following incidents of fighting between the parents and drug abuse by Father. On October 2, 2015, the juvenile court sustained a section 300 petition as to B.M. (*In re L.M., supra*, A148062.)

“At the October 16, 2015 disposition hearing, the children were again returned to the parents’ custody with family maintenance services, in accordance with the Department’s recommendations.

“[¶]

“On February 19, 2016, the Department filed a section 387 supplemental petition as to L.M. and B.M. The Department reported that both children had tested positive for methamphetamines on February 11, 2016, via a hair follicle test submitted, and Father had tested positive for methamphetamine on January 28, 2016. Additionally, the children had recently been exposed to two incidents of domestic violence. On December 14, 2015, the family was in a car in the McDonald’s drive-through when Father allegedly became emotionally abusive towards Mother, who then struck Father in the face, breaking his nose. Mother was arrested. On December 25, 2015, Father allegedly assaulted Mother in his home while the children were present. The resulting injuries were severe enough that Mother sought medical treatment at the hospital. Reportedly, one child was in the Mother’s arms and the other child was struck by Father during the incident. [¶] . . . The juvenile court ordered the children detained.

“[¶]

“A contested jurisdiction hearing was held on March 21, 2016. After testimony was taken, the court found the previous disposition had not been successful in protecting the children. Allegations that the children had been exposed to drugs and domestic violence were found true and the children were [again] ordered removed from their parents’ care. . . .

“[¶] . . . [¶]

“At the disposition hearing on April 15, 2016, the social worker testified that Mother had engaged in a batterer’s intervention program and in mental health services. Father was unable to complete a court-ordered hair follicle test because he had shaved his head. Father had engaged in parenting classes but did not want to enroll in a batterer’s intervention program because he did not believe he was the perpetrator. (Fn. omitted.) Father said he has a medical marijuana card and knew he would test dirty under that program. He also claimed he had to work and did not have time for the program. He walked out of the courtroom before the end of the hearing.

“An Indian expert witness testified, opining that the children were at risk of serious harm if they remained in the parents’ custody. He recommended that the children remain in foster care until the parents could demonstrate a period of sobriety and address their case issues. He further opined that the Department had made active efforts to prevent the breakup of the family.

“The juvenile court found by clear and convincing evidence that the children should be removed from their parents’ custody. The parents were granted reunification services. Father was directed to participate in mental health counseling, enroll in a batterer’s intervention program and a substance abuse treatment program, and submit to random drug testing.”³ (*In re L.M., supra*, A148062.)

Father subsequently appealed from the September 8, 2017 dispositional findings and orders that terminated reunifications services. Father’s counsel filed a no-issue statement and his appeal was dismissed on December 27, 2017 (*Del Norte County Department of Health & Social Services v. B.M.*, A151571).

II. Father’s Section 388 Petitions

A. Father’s First Petition

The hearing on selection of a permanent plan under section 366.26 was set for January 5, 2018. In advance of the permanency planning hearing, Father filed a section

³ Addressing Father’s appeal from this order, we sustained the juvenile court’s decision in our opinion in *In re L.M., supra*, A148062.

388 petition requesting the children be returned to his custody with family maintenance services. In support of his petition, he indicated he had approximately 40 days of “full engagement” in a residential treatment program, and that the program encouraged him to have his children with him. He also provided documentation supporting his participation in the program and his progress.

At the permanency hearing on January 5, 2018, the juvenile court denied Father’s request for an evidentiary hearing on his section 388 petition. The court found Father had not made a prima facie case showing changed circumstances, or that it would be in the children’s best interest to be placed with him. The court appointed the children’s caretakers as their legal guardians. The court found termination of parental rights would be detrimental to the children because they are Indian children. The children’s tribes had identified guardianship as the permanent plan. Dependency jurisdiction was continued for another six months to determine visitation. Father did not appeal from this order.

At a postpermanency review hearing on February 2, 2018, Father requested overnight weekly visits with the children. He submitted documents showing he had completed his residential program and moved into a sober living house. He continued to test clean, had engaged in a domestic violence program, and had three very good visits with the children in January 2018. However, the children’s legal guardian reported that visitation appeared to negatively affect the children, as they acted out considerably after their visits. The juvenile court denied Father’s visitation request, indicating that it would reevaluate visitation if Father continued to stay clean and if the visits became easier for the children.

B. Father’s Second Petition for Modification

On May 21, 2018, Father filed a second section 388 petition, requesting that the children be returned to his custody and dependency jurisdiction be terminated. In support of his petition, Father reported that he had completed his residential drug treatment program and was in outpatient aftercare. He had been clean for over six months. He provided documentation including evidence of his completed residential program, progress letters from his sober living house, records of clean drug tests and his

participation in a domestic violence program, and verification showing his child support payment history.

Father also submitted a letter from the Choctaw Nation of Oklahoma indicating its support for the children's return on the condition that Father live with the paternal grandfather.⁴ The letter specifically stated: "The Choctaw Nation does not recommend that the children live in the Oxford House with [Father]. The tribe does not feel that this would be a safe environment for children of this age. [Father] has stated that his father is a huge support for him and [Father's] father has also asked the Court for guardianship of [the children]. The Choctaw Nation would recommend that the children be placed with [Father] only if [Father] is living with his father where [Father] would have support through his sobriety and help with the children, if needed. Active efforts have been made in this case and have been successful. The Choctaw Nation feels that it is in the best interest for children to be with family, especially with a biological parent. A child rearing practice of the Choctaw Nation is children being closely connected with extended family."

The juvenile court set a hearing for June 1, 2018, on whether it should grant or deny an evidentiary hearing on Father's section 388 petition. In a May 29, 2018 status review report, the Department indicated that the guardians continued to have concerns about the behavioral repercussions that followed the children's visits with their biological parents. For example, after visits L.M. would evidence nightmares, speech regressions, bed wetting, aggressions with other children that included choking and hitting, and chronic fears of abandonment, anxiety, and a struggle to stay in school. These behaviors improved when visitation decreased. His therapist reported that L.M. was forming good attachments with the guardians' family. The therapist opined that many of the boy's

⁴ The paternal grandfather had also filed a section 388 petition requesting legal guardianship of the children. The paternal grandfather's request for an evidentiary hearing was denied along with Father's, based on his failure to make a prima facie showing that the requested change would be in the children's best interests. On October 22, 2018, we dismissed the paternal grandfather's appeal from the denial after he failed to file an opening brief.

behaviors could be traced to the child's struggles with stress and inconsistency, and he expressed no opinion regarding whether visitation should be increased or decreased. B.M. had periodic incidents of biting and aggression that also correlated around changes and stress. Reportedly she had no incidents of biting in over a month, which coincided with reduced contact with the parents.

As to their current placement, the Department reported that the children continued to indicate that they feel safe and are very close with the people that they identify as their family. The Department also continued to receive reports from the school and other service providers of a dramatic improvement in the children's emotional and social health since their placement in a stable and loving environment. Regarding Father's section 388 petition, the Department noted Father's sobriety was still "newly established." The Department emphasized the family's four-year history of episodes of periodic sobriety ending in relapse, resulting in the children repeatedly being uprooted and placed in an "emotional limbo" with an unknown future regarding their permanency.

At the June 1, 2018 hearing, the juvenile court considered submissions from the Department and from Father, including the letter from the Choctaw Nation. The court indicated it would not grant an evidentiary hearing on Father's modification petition because Father had not made a prima facie showing that returning the children to his custody would be in the best interests of the children. The court noted: "The children, according to the social worker's report, have bonded with the guardians and have stability and permanence in their life. They appear to be doing much better. There are still issues—bedwetting, nightmares, speech regression, chronic feelings of abandonment. But those appear to be getting better, according to the social worker's report. I fear it would be a huge mistake to move those children out now after they've just been in this stable home for, you know, about six months." The court also noted that at this stage in the proceedings the focus was on the well-being of the children, as the time for working on reunification had already passed. The court found continued court supervision was no longer necessary and dismissed dependency jurisdiction.

DISCUSSION

Father argues the juvenile court erred in summarily denying his section 388 modification petition, asserting his petition and supporting attachments established a prima facie case for both changed circumstances and that the proposed change was in the best interests of the children. We are not persuaded.

“A parent may regain custody after reunification services have been terminated only by showing that changed circumstances demonstrate a return to parental custody is in the child’s best interests.” (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1235.) To prevail on a section 388 petition, the parent must establish by a preponderance of the evidence that “(1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child.” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) Section 388 requires a petitioner to make a prima facie showing of both elements to trigger an evidentiary hearing. (*In re Zachary G.*, at p. 806.) A court may summarily deny the petition if the parent fails to make a prima facie showing either of the change of circumstances or new evidence requiring a changed order, or that the relief sought would promote the child’s best interests. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188–190; see *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 322–323.)

“ ‘A “prima facie” showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.’ ” (*In re Josiah S.* (2002) 102 Cal.App.4th 403, 418.) Courts must liberally construe a section 388 petition in favor of its sufficiency (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309–310), and thus a parent need only allege a prima facie case in order to trigger the right to an evidentiary hearing. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 592.) However, a petition that contains general, conclusory allegations is not sufficient to make out a prima facie case. (*Id.* at p. 593 [denying section 388 petition that consisted of “general averments rather than specific allegations describing the evidence constituting the proffered change in circumstances or new evidence.”].) In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 258.)

We review the juvenile court's summary denial of Father's section 388 petition for abuse of discretion. (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079.) The denial must be upheld unless we can determine from the record that the juvenile court's decisions exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, we have no authority to substitute our decision for that of the juvenile court. (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.) "It is rare that the denial of a section 388 motion merits reversal as an abuse of discretion." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 522.)

Assuming, without deciding, that Father stated a prima facie case for changed circumstances, we agree he has failed to establish a prima facie case that the best interests of the children would be served by setting aside the six-month-old legal guardianship. Father does not contest the juvenile court's finding that the children were thriving in a stable, loving home and that they had well-established relationships with their legal guardians. While the record suggests the children are bonded to both of their parents, they were also flourishing in the stable home of their legal guardians, and the petition made no specific allegations to show that a change in custody at this time would be in the children's best interests.

On appeal, Father merely states that "it was best for the children to be placed back with their biological father." His petition relied almost entirely on the Choctaw Nation's letter of support, but Father overlooks that the Choctaw Nation recommended that the children be placed with him on the condition that he and the children reside with the paternal grandfather. Father has not indicated he is planning on residing with the paternal grandfather, and his petition did not specifically request such a placement, instead asking for the children to be placed with him in his sober living facility. The Choctaw Nation's letter specifically did *not* endorse placement of the young children with their Father in a sober living facility.

The juvenile court also observed that the petition did not acknowledge the emotional stress the children, particularly the older child, have experienced in relation to their parents' substance abuse and domestic violence issues. Notably, the children

regressed following visitation with their parents, with B.M. experiencing biting and aggression and L.M. exhibiting nightmares, bed wetting, aggression at school, and other behaviors. The children's behavioral issues subsided, apparently in response to decreased contact with their parents. The petition does not address these ongoing concerns or why the children's emotional well-being would best be served by uprooting their stable environment and placing them in the care of Father. We find the court was amply justified in concluding that Father's request to set aside the order placing the children with their current legal guardians was premature in light of the evidence in the record.

Finally, we observe that while the juvenile court did not grant an evidentiary hearing, Father was granted a hearing to argue in favor of his petition. This gave him the opportunity to present more evidence to the court in order to persuade it to grant a full evidentiary hearing. Father took advantage of this opportunity by filing supplemental documentation to support his section 388 petition. As the Department notes, the court could have simply denied the petition by checking a box and signing the order, without giving him an opportunity to argue any points.

We emphasize that the children have already experienced several unsuccessful reunifications with their parents. At this stage of the proceedings, when reunification services have been terminated, "the focus of the proceedings changes from family reunification to the child's interest in permanence and stability." (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1163.) In this case, the juvenile court did exactly what is mandated by law—it focused on the children's permanence and stability.

DISPOSTION

The order denying Father's section 388 petition is affirmed.

Sanchez, J.

WE CONCUR:

Humes, P. J.

Banke, J.

A154551 In re L.M. et al.